

No. 13,118

IN THE
**United States Court of Appeals
For the Ninth Circuit**

RAY CALMES,

vs.

Appellant,

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF JURISDICTION.

The indictment filed in the United States District Court for the Northern District of California, Southern Division, charged appellant and others with the crime of conspiracy in that District in violation of 18 U.S.C., sec. 371, and 18 U.S.C., sec. 2401. (CT 1-3.) The District Court had jurisdiction, 18 U.S.C., sec. 3231; Rule 18, Federal Rules of Criminal Procedure. The appellant was convicted and was sentenced to imprisonment and fine by final judgment made and entered August 23, 1951. (CT 170-171.) Appellant's notice of appeal to this Court was filed August 29, 1951. (CT 175.) The appeal was timely, Rule 37 (a), Federal Rules of Criminal Procedure. Jurisdiction of this Court to review the final judgment of the District Court is sustained by 28 U.S.C., secs. 1921, 1294.

STATEMENT OF THE CASE.

The indictment was filed on April 18, 1951. (CT 3.) It charged that "on or about January 27, 1951, and continuously thereafter up to and including the 12th day of April, 1951, the above named defendants, Edward J. Carrigan, Ray Calmes, Jack Reynolds, and Sam Neider, did, in the Northern District of California, Southern Division, *conspire together* (emphasis ours), and with Phil Davis and John Church, with the intent and purpose to defraud the United States in the exercise of its governmental powers by impairing, obstructing and interfering with the lawful function of a Department of the United States, to-wit, the Department of Justice, the Bureau of Prisons thereof, and the Attorney General in attempting unlawfully and corruptly to influence, obstruct and impede said Attorney General and said Bureau in the designation of places of confinement where sentence shall be served and transfers made from one institution to another in connection therewith of a Federal prisoner thereto committed to the custody of said Attorney General, said Federal prisoner being one Phil Davis, convicted in the United States District Court for the Northern District of California, in Action Number 10290, of having operated a motor boat on waters of Lake Tahoe in a reckless and negligent manner, contrary to the provisions of The Motor Boat Act of 1940, and sentenced to six months imprisonment and to pay a fine of \$1,500.00; and that during the existence of said conspiracy, one or more of the accused, as hereinafter mentioned by name, did the following acts in further-

ance of and to effect the object of said conspiracy:” (CT 1-2.)

Here five overt acts, in furtherance of the conspiracy, occurring between January 27, 1951, and April 12, 1951, were alleged; the single overt act directed at appellant was as follows (CT 3): “4. On April 11, 1951, said John Church had a conversation with said defendant Ray Calmes at said Phil Davis’ Automobile Agency.” (CT 3.)

A judgment of acquittal was entered by the Court on July 30, 1951, in favor of defendant Neider. (CT 12-13.) Appellant’s motion for acquittal was denied. (RT 736-737.) The appellant and defendants Carrigan and Reynolds were found guilty by the jury on August 4, 1951. Appellant’s motion for a new trial was made orally and denied August 23, 1951. By judgment and commitment on August 23, 1951, appellant was sentenced to imprisonment for two years and fined \$1,000.00. (CT 170-171.) Appellant filed his notice of appeal on August 29, 1951. (CT 174.)

The record on appeal is voluminous and is contained in eleven volumes. The first volume contains the clerk’s transcript. (CT 1-178.) The other ten volumes contain the reporter’s transcript. (RT 1-1511A.) The complexity of the fact situation, in addition to its lengthiness, is accentuated by the following factors:

Firstly, a large part of the testimony came into the record under rulings of the Court limiting it to the case against defendants other than this appellant. This is especially true of testimony given by John Church,

an alleged conspirator, though not a defendant, who testified at length concerning statements and declarations made in his presence by the various defendants. (RT 19.)

Secondly, testimony of Church and Davis, the latter another alleged conspirator, though not a defendant, concerning declarations made by defendant Neider was expunged as evidence by a ruling of the Court when Neider's motion for judgment of acquittal was granted. (RT 741-742.)

Thirdly, the testimony of government witnesses respecting alleged statements and declarations of defendant Carrigan after he was apprehended on April 12, 1951, was limited by rulings of the Court to the case against defendant Carrigan. (RT 665.)

For purposes of clarification, it is deemed advisable at this time to introduce the personnel of the alleged conspiracy or conspiracies and to dwell briefly upon their inter-acquaintanceships.

Appellant Ray Calmes was a Deputy United States Marshal. He had eight years experience and operated in the east bay area. He was a resident of Alameda County. During his period of employment he had served under Marshal Vice, acting Marshal Roseen and defendant Carrigan. (RT 962.) Appellant was not acquainted with defendant Carrigan prior to August 11, 1950. (RT 798.) During all periods of the alleged conspiracy or conspiracies, he was serving under defendant Carrigan. He did not see or talk with defendant Reynolds until *after* April 12, 1951, the

termination date of the alleged conspiracy or conspiracies. (RT 997-998.) Appellant did not become acquainted with defendant Neider until after April 12, 1951. (RT 1045.) Appellant became acquainted with Church in April, 1949, in connection with a marshal's sale of an automobile in Oakland, California. (RT 19.) Appellant became acquainted with Davis at the same date. (RT 229.) Sometime in the year 1950, appellant purchased an automobile from the Davis Automobile Agency. (RT 229.) Appellant frequently had his automobile serviced at the Davis Automobile Agency following the purchase of said automobile. (RT 990.)

Defendant Edward J. Carrigan was the United States Marshal for the Northern District of California. (RT 797.) He had been appointed to that office on April 11, 1950, by the President. (RT 797.) Immediately prior to his appointment, he was postmaster of the City of San Mateo. (RT 798.) He had had no prior experience with the type of work associated with the marshal's office. Carrigan became acquainted with appellant Calmes, his deputy, when taking office. (RT 798.) He knew of the existence of defendant Reynolds and had met him on two or three occasions, all prior to January 27, 1951. (RT 798.) He had no contact, personally or verbally, directly or indirectly, with Reynolds between January 27, 1951, and April 12, 1951. (RT 798-799.) Reynolds had opposed Carrigan's candidacy for United States Marshal by actively supporting a rival candidate. (RT 882, 1277-

1278.) Carrigan became acquainted with Church and Davis at the Phil Davis Automobile Agency on January 27, 1951. (RT 800, 803.) Carrigan did not meet Church again until April 12, 1951. (RT 79, 91, 809.) He never saw Davis after January 12, 1951, until the date of the trial of this action. (RT 250, 809.)

John L. Church, named as a conspirator but not as a defendant, was general manager of the Phil Davis Automobile Agency. (RT 19.) He assumed this position March 1, 1949. (RT 19.) Church became acquainted with appellant in the year 1949. (RT 19.) This meeting came about during the course of a marshal's sale in the City of Oakland, at which sale appellant and Church were acting in the furtherance of their respective duties as deputy marshal and sales manager. (RT 20.) Church saw appellant on occasions thereafter when appellant would have his car serviced at the Phil Davis Automobile Agency. (RT 20, 990.)

Phil Davis is and was, at the time of the alleged conspiracy or conspiracies and prior thereto, the owner of an automobile agency in Oakland. In July, 1949, Davis had been convicted in the United States District Court, at Sacramento, California, of a misdemeanor, to-wit, the offense of violating the Motor Boat Act, 46 U.S.C., sec. 526. He was sentenced to six months imprisonment. This Court affirmed the judgment on December 11, 1950. (*Davis v. United States*, 9 Cir. 185 F. (2d) 938.) The Supreme Court denied a petition for certiorari on February 26, 1951. (*Davis v. United States*, 340 U.S. 932, 71 S.Ct. 495.) From July, 1949, to

March 7, 1951, Davis was out on bail. An order to take Davis into custody was issued by the District Court, at Sacramento, California, and reached the marshal's office in San Francisco on March 5, 1951. (RT 480.)

Shortly prior to January 27, 1951, appellant and defendant Carrigan had a discussion in the marshal's office in San Francisco concerning the prospective trade of Carrigan's 1947 Pontiac automobile for a later model Chrysler. (RT 963-964.) Carrigan indicated he was in the market for a 1950 model Chrysler automobile and had investigated the matter at various agencies in San Francisco and on the Peninsula. (RT 964.) Appellant suggested that the Phil Davis Automobile Agency had some models available. (RT 964.) Carrigan asked appellant to find out what particular models the Davis Agency had in stock. (RT 964.) In pursuance of this conversation, appellant, at Carrigan's request, made an appointment for Carrigan with Davis and Church on January 27, 1951, at 11:00 o'clock A.M.. (RT 24.) Appellant introduced Carrigan to Church and these two held a conversation. (RT 25.) The testimony is conflicting as to what was said at that time and place. In any event, appellant took no part in the conversation. (RT 24, 25, 968.) Carrigan and appellant Calmes left the agency, entered their respective automobiles and departed. (RT 968.) Church testified that appellant said, "I think it will be worth Phil Davis' while to make *that* (emphasis ours) deal with Carrigan." (RT 27.) No explanation was ever offered as to what the words "*that deal*" referred. Car-

rigan purchased a Lincoln automobile at another agency. (RT 969.)

As of January 27, 1951, Davis was out on bail pending his appeal and following his conviction in the United States District Court at Sacramento. The case had received much publicity. There was a public feeling of sympathy extant for the child whose injury was caused by Davis' negligent operation of his motor boat, and Davis himself was the object of public antipathy.

Davis' petition for certiorari was denied on February 26, 1951. (RT 257, 1114.) Davis' attorneys communicated with Carrigan respecting a place of surrender which would be least embarrassing to Davis and would cause him the least publicity. (RT 1115.) A member of the law firm which represented Davis at the time made a personal visit to defendant Carrigan at his office to determine if it was possible for Davis to serve his sentence at a local county jail. On March 7, 1951, Davis surrendered to appellant one block from his place of business in Alameda County, and he was taken to the Santa Rita Rehabilitation Center, a branch of the Alameda County Jail. (RT 819-821, 970-972.)

Defendant Reynolds' first contact with the *Davis* case was before Davis went to trial. (RT 1208.) At that time, defendant Neider, in behalf of his friend Davis, asked Reynolds if he could aid or advise Davis. (RT 1208-1210.) Reynolds answered that he could not. (RT 1209.) In November, 1949, Neider asked Reynolds

if he could recommend an attorney for Davis. (RT 1211.) Davis had been convicted and his case had reached the appeal stage. (RT 1211-1212.) Reynolds made a recommendation and Davis employed the attorney. (RT 1212-1213.) Early in February, 1951, the *Davis* case was pending in the Supreme Court. Neider asked Reynolds if he thought it could be arranged for Davis to serve his sentence in a local county jail. (RT 1225.) Reynolds said he would contact a friend, one Augustine F. Gaynor, regarding this matter. (RT 1226.) A short time later Reynolds told Neider that the matter could be arranged; that it would have to be handled in Washington, and that the expenses would be \$1,000.00. On February 10, 1951, Reynolds, Neider and Davis had a meeting regarding this matter, at which time no decision was made as to a positive course of action. (RT 1232-1234.) On March 15, 1951, Reynolds advised Neider that on the following day he was leaving to go to Santa Monica for a labor convention. (RT 1243.) Neider asked Reynolds to stop en route to see Davis. (RT 1244.) Reynolds did so. At this conversation, according to Reynolds' testimony, Davis said he was afraid he would be moved to McNeil Island. (RT 1250.) Davis told Reynolds he wanted to see Neider. (RT 1251.) Neider visited Davis at Santa Rita on March 18, 1951. (RT 1074.) At this time Davis asked Neider to contact Reynolds and have him proceed with the arrangements to assure his imprisonment in a local jail. (RT 1079.) Neider mentioned the expense of \$1,000.00 and Davis suggested a payment of \$500.00 and a second payment of \$500.00

when he was assured he would remain at Santa Rita or some other local jail. (RT 1079.) Neider promised to make the payment when Reynolds returned from the south. (RT 1080.)

On March 19, 1951, Church telephoned Neider and advised him that Davis had instructed Church to give \$500.00 to Reynolds. (RT 1081.) On March 19, 1951, Church left \$500.00 for Reynolds in an envelope at the cigar stand of the Union Club in Oakland. (RT 40.) After Reynolds returned from the south, on March 21, 1951, he telephoned Neider and asked why the envelope contained only \$500.00 instead of \$1,000.00. (RT 1181, 1256.) Neider explained the alternative proposition formulated by Davis, that he would pay an additional \$500.00 when he was assured he would remain in a local county jail. (RT 1181.) Reynolds conferred with Gaynor on March 20, 1951, and attempted to persuade him to go to Washington on the contingency basis. (RT 1258-1259.) Gaynor refused flatly and insisted he be paid \$1,000.00 before he would leave for Washington. (RT 1260, 1406-1409.)

Neider made an appointment for Church to meet Reynolds on March 23 or 24, 1951. The meeting occurred with Reynolds, Church and Neider participating. (RT 1182-1183.) At this meeting Reynolds offered to return the \$500.00 to Church. (RT 47.) Church said he had no authority to receive it. (RT 47.) On March 25, 1951, Church visited Davis at Santa Rita. (RT 49.) On March 26, 1951, Church had a

meeting with Reynolds at Reynolds' office in the Labor Temple in Oakland. (RT 50.) The testimony of Church and Reynolds is conflicting as to the essence of this conversation. (RT 50-51, 1269-1273.) At this meeting Reynolds returned the identical \$500.00 to Church. (RT 50-51.)

On March 7, 1951, appellant had taken Davis to the Santa Rita Rehabilitation Center. (RT 970-972.) Appellant had no further contact with Davis or Church until April 5, 1951. (RT 58.) Appellant left for Honolulu on a vacation on March 24, 1951, and returned to San Francisco April 4, 1951. (RT 923.) Effective March 26, 1951, Church was acting under the direction and supervision of the F.B.I., whom he had contacted on that date. On April 5, 1951, Church telephoned appellant at his place of business in Oakland. (RT 57.) Church told appellant that efforts had been made to move Davis to McNeil Island and asked appellant what he knew about it. (RT 57.) Appellant stated that he had just returned from Honolulu, that he would contact the marshal (Carrigan) and would then get in touch with Church. (RT 58.)

On April 6, 1951, appellant visited Church at his office at the Phil Davis Automobile Agency. (RT 58, 974.) The testimony is conflicting as to the substance of this conversation. Appellant testified that Church again stated he had been informed that Davis was going to be transferred to McNeil Island and inquired whether it was because they had not given Carrigan a better deal on an automobile. (RT 974.) Appellant replied that Carrigan had better offers on a car deal

and that Carrigan was not interested in any way in any car deal. (RT 974.) Church then asked appellant to find out why they were transferring Davis. (RT 974.) Appellant told Church he would let him know. (RT 974.) Church's testimony as to the conversation was that appellant stated he had talked to Carrigan (RT 58); that Carrigan told appellant he was disturbed over the fact that so much publicity had been directed toward the marshal's office as a consequence of Davis' arrest. (RT 59.) On April 9, 1951, appellant returned to his position as Deputy United States Marshal. (RT 974.) On that day appellant told Carrigan that Church had asked about the imminence of the Davis transfer. (RT 975.) Carrigan replied, "That is right." Carrigan said he was tired of hearing all of these rumors about him being paid to keep Davis at Santa Rita and wanted to get to the bottom of it to stop them. (RT 975.) Carrigan *ordered* appellant to return to Oakland to ferret out the source of the rumors and to learn as much about the situation as he could. (RT 976.) Appellant then visited Church at the Davis Agency on April 9, 1951. (RT 60, 976.) Again the testimony concerning this conversation is conflicting. Appellant's testimony is that he advised Church that Carrigan was tired of the rumors regarding Davis' prospective transfer, that he felt Church was the source of the rumors, and that Carrigan intended to trace the rumors to their source. (RT 976.) Church's version is that appellant stated that Carrigan had suggested that Davis give appellant a new car. (RT 60.) Church told appellant that

they had offered \$200.00 a month for five months to Neider for special privileges at Santa Rita (RT 977-978); that Neider had told Church the money was going to Carrigan. (RT 977.)

On April 10, 1951, appellant had a conversation with Carrigan during which he asked the latter if he had any agreement with anyone for special privileges for Davis. (RT 979.) Appellant then told Carrigan that Church had said that Davis had made an agreement to pay \$200.00 a month for five months, and that when Church paid \$500.00, they wanted \$1,000.00. (RT 979.) Carrigan asked to whom the money had been paid. (RT 979.) Appellant told him it had been paid to Neider. (RT 979.) Carrigan became enraged and said that he "had a good mind to go up and have those s. b.'s indicted right now." Appellant cautioned Carrigan that the only evidence they had at the time was Church's word. (RT 979.) Carrigan then said, "You go back there and tell them what we want," or "go back and tell them that if they were throwing any money around to throw it our way," and, "We will get to the bottom of this. I don't believe Church has been paying any money out. I believe he has been keeping it and spreading the rumors that he is paying it to somebody and using my name, and that is where all the rumors have been started." Later appellant cautioned Carrigan against moving Davis to McNeil Island, on the theory that it would be playing into the hands of the parties who were threatening Davis with such removal. (RT 981.) Appellant suggested that Carrigan remove Davis to the county jail at Fairfield,

California. (RT 63, 981.) Carrigan then had the Davis transfer orders made out to Fairfield. (RT 981.)

Pursuant to his orders from his superior, Carrigan, appellant called on Church that afternoon, April 10, 1951, at the Davis Agency. (RT 63, 981.) Appellant advised Church that Davis was being transferred to Fairfield that day by appellant, in accordance with orders issued by Carrigan. (RT 63, 982.) Appellant advised Church that if he had any questions of business to discuss with Davis, he should visit Davis that day. (RT 63, 982.) When appellant arrived at Santa Rita, Church was conferring with Davis. Appellant then advised Davis he had come to remove him to the Fairfield County Jail, that Carrigan wanted to remove Davis from this place. Davis, who at an earlier date had been importuning about his treatment at Santa Rita, then advised appellant that he desired to remain there. (RT 983.) Appellant advised Davis he had no authority to allow him to remain. (RT 983.) Davis requested that appellant telephone Carrigan and convey to him his desire to remain at Santa Rita. (RT 984.) Appellant then telephoned Carrigan. (RT 986.) Appellant conveyed Davis' message to Carrigan and returned home. (RT 987.)

On April 11, 1951, appellant had a conversation with Carrigan at the marshal's office. (RT 987.) He again stated to Carrigan that Davis desired to remain at Santa Rita. (RT 987-988.) Appellant also told Carrigan that Davis had suggested a cash deal and wanted him to name an amount. (RT 988.) Carrigan replied, "That is all right. We will work that out and maybe

we can get the whole bunch all at once." Carrigan then ordered appellant to visit Church and advise Church that "we want \$2,000.00". (RT 988.)

Pursuant to *Carrigan's instructions*, appellant then visited Church at the Davis Agency. (RT 988.) Appellant conveyed Carrigan's message to Church. (RT 988-989.) Church said he would verify the matter with Davis. (RT 989.)

On the morning of April 12, 1951, Church telephoned appellant and advised him that he had conferred with Davis, that Davis had verified the transaction, but that he had given orders that \$2,000.00 should be paid directly to Carrigan. (RT 67, 989.) Appellant conveyed this message to Carrigan. (RT 67-68, 989.)

From that morning on, the record is concerned with the meeting of Church and Carrigan that afternoon, April 12, 1951, in San Francisco, when the F.B.I. apprehended Carrigan with the \$2,000.00 in his possession.

SPECIFICATION OF ERRORS.

1. The District Court erred in denying appellant's motion for judgment of acquittal.
2. The Court erred in instructing the jury as follows:

"Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by com-

mon or different means, all leading to the same unlawful result." (RT 1484, lines 18-22.)

"Mr. Burns. The only objection, if Your Honor please, for the record is in instruction No. 13 where Your Honor said, 'Although as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together.' It is my understanding of the law that there has to be concerted action in a conspiracy, and as I indicated before there could be co-existent two separate conspiracies. * * *'" (RT 1499, line 22 to 1500, line 5.)

"Mr. Deasy. I raise the same objection, may it please the Court." (RT 1500, lines 7-8.)

3. The District Court erred in denying appellant's motion for a new trial.

SUMMARY OF ARGUMENT.

(a) Appellant's contention is that the general conspiracy alleged in the indictment is not supported by substantial evidence. The indictment alleged a conspiracy continuing from on or about January 27, 1951, up to and including April 12, 1951. On March 26, 1951, and thereafter, Davis and Church were acting under orders of the FBI and hence could not be parties to the conspiracy. At the trial the District Court granted a judgment of acquittal in favor of defendant Neider, another alleged co-conspirator. The record contains

no evidence that appellant ever communicated or was even remotely associated in any way with defendant Reynolds regarding the question of Davis' imprisonment. From April 9, 1951 to April 12, 1951, appellant was merely following the instructions of his superior officer, defendant Carrigan.

(b) Appellant urges that his conviction as a co-conspirator in a general conspiracy cannot be supported by evidence proving two or more isolated and separate conspiracies on the basis of the reasoning in the *Kotteakos* and *Canella* cases. (*Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557; *Canella v. United States*, 157 F. (2d) 470.)

Appellant urges reversal of judgment on the basis that erroneous instructions operated to his prejudice.

Appellant urges that his motion for a new trial should have been granted on the basis of a substantial variance between the allegations of the indictment and the proof as adduced at the trial.

ARGUMENT.

1. THE JUDGMENT AGAINST THE APPELLANT SHOULD BE REVERSED ON THE BASIS THAT IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The indictment charged that "on or about January 27, 1951, and continuously thereafter up to and including the 12th day of April, 1951" the defendants Edward J. Carrigan, Ray Calmes, Sam Neider and Jack Reynolds *conspired together* (emphasis ours) and with Phil Davis and John Church to defraud the

United States in the exercise of its governmental functions by unlawfully attempting to influence, obstruct, and impede the Attorney General and the Bureau of Prisons in the designation of the places of confinement where sentence shall be served and transfers made from one institution to another in connection therewith of a Federal prisoner theretofore committed to the custody of said Attorney General, said Federal prisoner being one Phil Davis.

The sole overt act ascribed to appellant was as follows:

“4. On April 11, 1951, said John Church had a conversation with said defendant Ray Calmes at said Phil Davis Automobile Agency.”

At the conclusion of the government's case, defendant Neider moved for judgment of acquittal, which motion was granted.

The record indicates that the entire association of defendant Reynolds to the alleged conspiracy or conspiracies was conducted either through Neider as an intermediary, or directly with Church or Davis. The record fails to show that Reynolds ever communicated in any form or manner with appellant or defendant Carrigan during the entire period of the alleged conspiracy or conspiracies.

There remains as possible general conspirators only appellant, defendant Carrigan, and Davis and Church. On *March 26, 1951* (emphasis ours) Davis and Church contacted the FBI and subsequent to that date both men were acting in accordance with directions issued

by the agents of that Federal agency. (RT 296-297.) Accordingly, on and after March 26, 1951, both Davis and Church ceased to be parties to any conspiracy. The intent to defraud which is a vital element of this conspiracy was lacking in Davis and Church. (*United States v. Socony Vacuum Oil Co.*, 310 U.S. 150.)

It will be noted that the indictment alleges January 27, 1951 as the commencement date of the general conspiracy. (CT 1.) The first overt act alleged in the indictment is that, "On January 27, 1951, said defendant Edward J. Carrigan met said John Church at the Phil Davis Automobile Agency, 2547 E. 14th Street, Oakland, California, and they held a conversation together." (CT 4.)

Appellant's only association with the January 27, 1951 incident was to arrange the appointment between defendant Carrigan as a prospective automobile purchaser with Davis and Church, as prospective sellers. (RT 965.) Appellant was present at this meeting but as he was not in the market for an automobile at that time he took little or no part in the conversation. (RT 966-968.) Appellant's next contention with the matter was on March 7, 1951, when Davis surrendered to appellant and was taken to the Santa Rita Rehabilitation Center, a branch of the Alameda County Jail. (RT 819-821, 970-972.) There is nothing in the record to indicate that appellant made any demands of any nature of Davis and Church between January 27, 1951 and March 7, 1951, when appellant took Davis into custody, and between March 7, 1951 and March 24, 1951, when appellant left for Honolulu on a vaca-

tion trip. (RT 973.) Appellant returned from Honolulu on April 4, 1951. But, as stated, on March 26, 1951, Davis and Church had contacted the FBI and were no longer parties to the conspiracy. (RT 92, 296, 297.)

Consequently, on April 5, 1951, the general and continuing conspiracy composed of six members, as alleged in the indictment, had dwindled to the appellant and his superior officer (Carrigan) and a third co-conspirator (Reynolds) with whom appellant had never communicated at any time. Neider was later acquitted by the trial Court on his own motion, and as explained, Davis and Church were operating under the supervision and direction of the FBI.

On April 5, 1951, Church telephoned appellant and a conversation followed. (RT 57, 973.) At this time Church told appellant that efforts had been made to transfer Davis to McNeil Island. (RT 57, 973.) Church asked appellant to investigate the matter and appellant assured him he would. (RT 57, 973.) On April 6, 1951, appellant visited Church at the Davis Agency in Oakland. (RT 59, 974.) At this meeting, by the testimony of Church himself, appellant stated that Carrigan was disturbed over the publicity which had come to the Marshal's office as a consequence of Davis' arrest. (RT 58, 59.)

On April 9, 1951, appellant resumed his official duties. (RT 975.) Subsequent to that date appellant, acting in his capacity as Deputy United States Marshal, operated entirely under the direction of, and

pursuant to orders given by his superior, defendant Carrigan. (RT 976, 979.)

Reviewing these points in the record, the judgment against appellant should be reversed on the basis that it is not supported by substantial evidence. Appellant's motion for judgment of acquittal based on the grounds of insufficiency of evidence was denied. Appellant may challenge this error on appeal despite challenge or failure to challenge in the trial Court. (*Bryan v. United States*, 338 U.S. 552; *United States v. Gardner*, 171 F. (2d) 753; *Karn v. United States*, 158 F. (2d) 568. Federal Rules of Criminal Procedure, Rules 29, 59, 18 U.S.C.A., following sec. 687.)

(b) Appellant earnestly urges on appeal that there was a fatal variance between indictment and proof. Allegations of the indictment claim a general conspiracy. The proof established, if at all, two or more isolated conspiracies. On the basis of the holdings in the *Kotteakos* and *Canella* cases, appellant's conviction as a general conspirator cannot be sustained. (*Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557; *Canella v. United States*, 157 F. (2d) 470.)

On January 27, 1951, the commencement date of the conspiracy, as alleged in the indictment, defendant Carrigan had a conversation with Church at the Phil Davis Automobile Agency. Church's testimony indicates that defendant Carrigan sought, without success, to use his position as United States Marshal to obtain a new model Chrysler automobile in exchange for his 1947 Pontiac, from the Davis Agency. Appel-

lant was present at this conversation but took little or no part in it. Church rejected the proposed exchange. Church, then was not a conspirator at this time. Defendant Reynolds was never a party to this incident. Carrigan purchased an automobile elsewhere. (RT 869-870.) If conspiracy there was on this date, it commenced and ended during the half hour period that Carrigan conversed with Church.

The next phase of the series of events involves only Church and Davis and defendants Reynolds and Neider. It extends from early in the month of February, 1951, to March 26, 1951. There is nothing in the record to indicate that appellant was a party to any of the conversations, communications or acts with any of these men.

On or about February 1, 1951, Neider, who was a friend and business associate of Davis, telephoned Davis and informed him that he (Neider) might have an arrangement that would be helpful to Davis in his present trouble. Neider advised Davis to contact defendant Reynolds. Davis did so. The testimony of Davis is that Reynolds said he was a good friend of Carrigan and that for \$200 a month for 5 months Davis would be placed in the Solano County jail and would be given special privileges. Davis agreed to "go along with the deal". On March 7, 1951, Davis was taken into custody and imprisoned at the Santa Rita Rehabilitation Center. On March 16, 1951, Reynolds called on Davis and advised him that if \$500 were not paid immediately, Davis would be transferred to McNeil Island. Pursuant to instructions given by

Davis, Church left \$500 for Reynolds at the Union Club in Oakland. Reynolds was in the Los Angeles area at the time. The testimony of Reynolds and Neider was that this was part payment of \$1,000 by Davis as expense money to send a representative, one Augustine F. Gaynor, to Washington in order to obtain from the Director of Prisons authorization for Davis to serve his imprisonment in a local county jail. Reynolds testified that this partial payment was unsatisfactory to Gaynor. The identical \$500 was returned to Church by Reynolds on March 26, 1951.

During this series of events which commenced on or about February 1, 1951, and terminated on March 26, 1951, appellant had no communication with any of these participants other than to take Davis into custody on March 7, 1951. Accordingly, if a conspiracy did exist, during this period, it was a separate one involving only Davis, Church and Reynolds. The inter-relationship of these men during this period was completely isolated from any connection with appellant. And if a conspiracy existed, it terminated on March 26, 1951, when defendant Reynolds returned the identical \$500 to Church.

The final transaction commenced on April 5, 1951, when Church telephoned appellant and it terminated on April 12, 1951, when defendant Carrigan was apprehended by the FBI. During this entire period Church and Davis were acting under the direction and supervision of the FBI. As such, they were not parties to any conspiracy. Their participation in the matter was not in furtherance of the criminal enter-

prise (*Fiswick v. United States*, 329 U.S. 211); rather, it was a frustration of it. There was no partnership in crime. If conspiracy there was, it existed solely between appellant and his superior officer, defendant Carrigan.

Accordingly, as the indictment alleges a general and continuing conspiracy, appellant was convicted by evidence proving at least three isolated and separate conspiracies. It is settled law that when the indictment alleges a single conspiracy and the proof establishes two or more separate and disconnected conspiracies, the variance is fatal and conviction cannot be sustained. (*Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557; *Canella v. United States*, 157 F. (2d) 470; *Brooks v. United States*, 164 F. (2d) 142; *United States v. Wills*, 36 F. (2d) 855.)

2. JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED ON GROUNDS THAT ERRONEOUS INSTRUCTIONS BY THE COURT ON MATERIAL ISSUES OPERATED TO APPELLANT'S PREJUDICE.

The Court erred in instructing the jury as follows: "Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by common or different means, all leading to the same unlawful result." (RT 1484, lines 18-22.)

"Mr. Burns: the only objection, if Your Honor please, for the record is in instruction No. 13, where

Your Honor said, 'Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together.' It is my understanding of the law that there has to be concerted action in a conspiracy, and as I have indicated before there could be co-existent two separate conspiracies." (RT 1499, line 22 to RT 1500, line 5.)

"Mr. Deasy: I raise the same objection, may it please the Court." (RT 1500, lines 7-8.)

On the basis of the record the government failed to show by the proof that all of the defendants were parties to the same scheme or common design. According to the challenged instructions the jury could have found that there were two or more co-existent but separate and isolated conspiracies in which the sole semblance of unanimity was the common design of extorting either money or an automobile out of Davis. It is conceivable that the ensuing confusion in the minds of the jurors, resulting from this instruction, resulted in their convicting the appellant of the general conspiracy. This was prejudicial error. (*Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557; *Brooks v. United States*, 164 F. (2d) 142.)

3. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL, HENCE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED.

In his oral motion for a new trial, appellant specified the error in instructions and also the variance between the allegations of the indictment which charged a general and continuing conspiracy and the proof which revealed, if at all, two or more isolated and separate conspiracies. The motion was denied and judgment and commitment followed. The laws of pleading and evidence will have to be re-written before variance of such magnitude between the allegations of the indictment and proof can bear the stamp of judicial approval. (*Enrique Rivera v. United States*, 57 F. (2d) 816; *United States v. Di Genova*, 134 F. (2d) 466.)

Wherefore, appellant respectfully submits that the judgment against him should be reversed.

Dated, Oakland, California,
March 17, 1952.

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